

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAI THI PHAM

Claimant

VS.

DOLD FOODS, INC.

Self-Insured Respondent

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Docket Nos. **1,013,951 &
1,013,952**

ORDER

Self-insured respondent requests review of the September 9, 2011 Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The respondent filed a motion to dismiss Docket Nos. 1,013, 951 and 1,013,952 pursuant to K.S.A. 44-523(f) because the claims had not proceeded to hearing within 5 years from the date the applications for hearing were filed. The application for hearings in both claims were filed on November 17, 2003.

The Administrative Law Judge (ALJ) denied respondent's motion to dismiss the cases noting that both claims had been filed before the effective date of the amendment to K.S.A. 44-523(f) which contained the 5-year limitation.

Respondent requests review of whether the ALJ erred in denying respondent's motion for dismissal for lack of prosecution.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The Board must first determine whether it has jurisdiction to consider this appeal. The Board only has jurisdiction to review "[a]ll final orders, awards, modification of awards, or preliminary hearing awards under K.S.A. 44-534a and amendments thereto made by

an administrative law judge."¹ It should be noted that the transcript of proceeding from the September 15, 2010 hearing notes the matter was a motion hearing. Moreover, the ALJ noted at the start of the hearing that "We have two motions, one from the claimant and one from the respondent."² The Board finds that this appeal is not from an order entered pursuant to the preliminary hearing statute.³ Stated another way, the order denying respondent's motion to dismiss the cases does not relate to an award of temporary total disability or medical treatment and is not a preliminary award under K.S.A. 44-534a.

Accordingly, for the Board to have jurisdiction to review the subject order, the order must be a final order, award, or modification of an award. The Board must next determine whether respondent's motion to dismiss these claims and the ALJ's denial of that motion constitutes a final order.

The Board concludes that the ALJ's Order that denied respondent's motion to dismiss the claims is an interlocutory order made by the ALJ during the litigation of workers compensation cases. It is an order that the ALJ has authority to make during the trial process, and the Board lacks jurisdiction to review such an order until it is contained in a final order or award.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. The Kansas Court of Appeals, however, has recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The court stated three criteria which make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is not effectively reviewable on appeal from a final judgment.⁴

Respondent's motion to dismiss, having been denied by the ALJ, does not constitute a final order as it can be raised at a future time. However, had that motion to dismiss been granted, it would have been a final order under K.S.A. 44-551 and would have satisfied the three criteria set forth in *Skahan*. Because the denial of the motion to dismiss is an interlocutory decision and not a final decision, the appeal must be dismissed.

¹ See K.S.A. 44-551(b)(1).

² M.H. Trans. at 4.

³ See K.S.A. 44-534a.

⁴ *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, it is the finding of the Board that respondent's appeal of the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 9, 2011, should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. Nelson, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

⁵ K.S.A. 2010 Supp. 44-555c(k).